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IN THE

Supreme Court of the United States

THE BLACK & DECKER DISABILITY PLAN,
Petitioner,

v.

KENNETH L. NORD,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR BERT BELL/PETE ROZELLE NFL PLAYER RETIREMENT PLAN AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE AMICUS CURIAE[1]

The Bert Bell/Pete Rozelle NFL Player Retirement Plan ("NFL Player Retirement Plan" or "Plan") benefits present and former National Football League ("NFL") players. The Plan is maintained under collective bargaining agreements between the NFL Management Council ("NFLMC"), the

[1] Pursuant to Rule 37.6, (1) counsel for a party to this case has not authored this brief in whole or in part, and (2) no person or entity other than the *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

bargaining representative of NFL clubs, and the National Football League Players Association ("NFLPA"), the bargaining representative of NFL players.

The NFL Player Retirement Plan provides disability and pension benefits to eligible players. Vested Players who are unable to work, under the terms of the Plan, receive total and permanent disability benefits until they reach the Plan's normal retirement age of 55. These benefits are paid even if the player's disability is not related to football and even if the player becomes unable to work decades after his NFL career ends. The Plan also provides up to 90 months of payments to eligible players who incur a "substantial disablement" arising out of NFL football, even if they are able to work.

The collective bargaining agreements and the current Plan document reflect decades of care by the NFLMC and the NFLPA to shape these disability benefits. Annual benefits for total and permanent disability currently range from $18,000 to over $224,000. The amount each eligible player receives depends on a variety of factors, such as what caused the disability and how soon after leaving NFL football the player became unable to work. There are special rules and exceptions forged through collective bargaining. For example, players who are unable to work because of alcohol abuse or the use of illegal drugs generally receive a lesser benefit. Because of IRS limits, the NFLMC and the NFLPA have also established a companion plan—the NFL Player Supplemental Disability Plan—that only pays disability benefits in excess of the limits for retirement plans. The NFL Player Retirement Plan makes all eligibility and classification decisions for disability benefits.

In accordance with federal law, the NFL Player Retirement Plan is jointly administered by representatives of its settlors (i.e., the NFLPA and the NFLMC), and has detailed procedures for processing and reviewing benefit claims. A Disability Initial Claims Committee ("Committee") makes

initial decisions on claims for disability benefits. This Committee has two voting members—one appointed by the NFLPA and one appointed by the NFLMC. A player who is dissatisfied in any way with a decision of the Committee may appeal to the Retirement Board. The Retirement Board has six voting members—three appointed by the NFLPA and three appointed by the NFLMC. The members of the Retirement Board serve without pay and average over 20 years each in NFL-related experience, in positions such as a player, coach, agent, or owner.

The Plan maintains a national network of qualified physicians to review each claim for disability benefits. If a player appeals a decision of the Committee, that player is sent to a second physician in this network for a completely independent examination and review. Of course, players are invited to submit any evidence they wish in support of their claim, including reports of their treating physician.

In the 40 years of its existence, the NFL Player Retirement Plan has been sued by many players seeking additional disability benefits. To minimize the cost of this litigation, the Plan's sponsors—the NFLMC and the NFLPA—have deliberately given the Committee and the Retirement Board the broadest possible discretion in deciding claims. Pursuant to this Court's decision in *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 115 (1989), decisions of the Retirement Board have been reviewed with deference under the arbitrary and capricious/abuse of discretion standard. Because the NFL Player Retirement Plan is jointly administered by a Retirement Board composed of equal numbers of labor and management members, courts have routinely held that the Retirement Board is not subject to a conflict of interest that might warrant less deferential judicial review. *E.g.*, *Courson v. Bert Bell NFL Player Retirement Plan*, 75 F. Supp.2d 424,

431 (W.D. Pa. 1999), *aff'd*, 214 F.3d 136 (3d Cir. 2000); *see also Jones v. Laborers Health & Welfare Trust Fund*, 906 F.2d 480, 481 (9th Cir. 1990).

The decision below will in many cases eliminate the discretion given to the Committee and the Retirement Board by the Plan's sponsors and settlors—the NFLMC and the NFLPA. The structure intended by these collective bargaining parties will be replaced by a requirement of deference to the views of a treating physician selected by the player. Litigation will increase and different rules will apply in different circuits. The NFL Player Retirement Plan therefore has a keen interest in the issue of whether the treating physician rule applies to ERISA plans.

Both petitioner and respondent have consented to the filing of this brief, and their written consents have been lodged with the Clerk of the Court. The NFL Player Retirement Plan filed a brief *amicus curiae* in *Delta Family-Care Disability and Survivorship Plan v. Regula*, No. 01-1840, addressing the issue that is presented in this case. The Petition for Certiorari in *Regula* is pending.

SUMMARY OF ARGUMENT

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The court of appeals' decisions in this case and in *Regula*, 266 F.3d 1130 (9th Cir. 2001), which were both written by Judge Betty Fletcher, apply a rule developed for Social Security disability benefits to private disability plans voluntarily created by employers. This rule, which is commonly referred to as the "treating physician rule," requires a high degree of deference to the views of the treating physician when deciding whether the claimant is entitled to disability benefits. For example, in the decision below, the Ninth Circuit found that the plan improperly relied on the reports of an independent examining physician and should have instead deferred to the views of the claimant's treating physician. Pet. App. 12-15. The Ninth Circuit thus stripped

The Black & Decker Disability Plan of the deferential review it otherwise would have received and reversed a denial of disability benefits under the *de novo* standard. *Id.*

There is no sound policy or historical basis for this rule. We are unaware of any evidence that treating physicians are less biased or more knowledgeable than independent examining physicians. To the contrary, ethical guidelines of the American Medical Association direct treating physicians to advocate for their patients, and direct independent examining physicians to be objective. Moreover, at its root, the precedent for the rule is hollow. The rule was created by judges years ago in mistaken reliance on earlier cases in which the court had simply found, based on the facts and circumstances, that the views of the treating physician were more persuasive than other evidence in that particular case. Later, faced with inconsistent versions of the rule among the different circuits, the Social Security Administration ("SSA") adopted a single statement of the rule simply to have a national standard.

The treating physician rule violates the statutory and regulatory scheme governing disability plans voluntarily established by employers. Such plans are governed by the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). ERISA is based on trust law and allows plan settlors to determine the standards for benefits and whether plan fiduciaries should be able to exercise discretion in deciding claims. ERISA also provides protections for participants and specific procedures for deciding claims. Congress vested the Department of Labor ("DOL") with authority over claims procedures, and DOL has issued detailed rules governing the consideration of disability claims. The Ninth Circuit's adoption of the treating physician rule violates ERISA in several ways:

- In violation of ERISA § 404(a)(1)(D), 29 U.S.C. § 1104 (a)(1)(D), it requires plan trustees and courts to disregard

plan language governing the payment of benefits in favor of the opinions of a treating physician with respect to his patient.

- In violation of ERISA § 503, 29 U.S.C. § 1133, it vests the SSA with *de facto* regulatory authority over ERISA plans. In ERISA § 503, Congress granted the DOL such authority. The decision below is also incompatible with DOL's governing regulation. The DOL's scheme of two levels of review, and two independent medical examinations, is not compatible with the concept that a treating physician's opinion may be controlling.
- In violation of this Court's decision in *Firestone*, it eliminates the ability of a disability plan settlor to give fiduciaries broad discretion in deciding claims.

The decision below will have serious adverse effects on disability plans established by collective bargaining. Collectively bargained plan provisions will be invalidated. Benefit costs will increase if benefits must be paid to persons who are not eligible under the provisions and procedures that the collective bargaining parties intended to apply. These costs may force employers and unions to reduce benefits or terminate plans.

ARGUMENT

I. THE TREATING PHYSICIAN RULE HAS NO POLICY BASIS AND IS BASED ON HOLLOW PRECEDENT.

The treating physician rule is a judicial creation. It has no basis in medical ethics or empirical evidence. Instead, treating physicians have ethical duties to place their patient's welfare above their own self-interest and above obligations to other groups, and to advocate for their patient's welfare. American Medical Association Council on Ethical and Judicial Affairs, Opinion E-10.15 ("The Patient-Physician Relationship"). By contrast, independent medical examiners

whether independent contractors or employees of a business or insurance company, have ethical obligations to evaluate objectively the patient's health or disability, and should not be influenced by the preferences of the patient, employer, or insurance company. American Medical Association Council on Ethical and Judicial Affairs, Opinion E-10.03 ("Patient-Physician Relationship in the Context of Work-Related and Independent Medical Examinations"). Medical ethics rules thus counsel *against* giving greater weight to treating physician reports.

Nevertheless, in the late 1970s and early 1980s, some circuit courts began to accord "greater weight" to treating physician reports than to independent examining physician reports in Social Security disability cases. *Murray v. Heckler*, 722 F.2d 499, 501-02 (9th Cir. 1983) (Fletcher, J.); *Bowman v. Heckler*, 706 F.2d 564, 568 & n.3 (5th Cir. 1983); *Allen v. Califano*, 613 F.2d 139, 145 (6th Cir. 1980); *Allen v. Weinberger*, 552 F.2d 781, 786 (7th Cir. 1977). In support of this new rule, these cases did not cite any scientific or empirical basis for placing greater weight on treating physician reports. Instead, they cited earlier cases also purporting to accord greater weight to treating physicians generally. For example, in *Murray v. Heckler*, the court cited *McLaughlin v. Secretary of Health, Education and Welfare*, 612 F.2d 701, 705 (2d Cir. 1980), and *Allen v. Califano*; in *Allen v. Califano*, the court cited *Whitson v. Finch*, 437 F.2d 728, 732 (6th Cir. 1971), and *Giddings v. Richardson*, 480 F.2d 652 (6th Cir. 1973).

These foundational cases did not accord "greater weight" to treating physician reports as a general matter. They merely stated that when presented with a treating physician report supporting a grant of Social Security disability benefits, a denial of those benefits must be supported by other substantial evidence in the record. The courts then found that there was insufficient evidence to overcome the particular

treating physician reports in the circumstances of those particular cases. As such, the courts in these cases expressed no preference for treating physician reports over examining physician reports as a general matter.

For example, in *Whitson v. Finch*, the Sixth Circuit was confronted with evidence from two treating physicians that the claimant was unable to work and with an examining physician report that did not appear to address employability. The government denied Social Security disability benefits based on the examining physician's report, and the Sixth Circuit rejected the denial. The Sixth Circuit stated that to rebut the specific findings of the treating physicians as to employability, the government was required to rely on reports that also addressed employability. *See also Gold v. Secretary of Health, Education, and Welfare*, 463 F.2d 38, 42 (2d Cir. 1972); *Teeter v. Flemming*, 270 F.2d 871, 874 (7th Cir. 1959) ("The expert opinion of Dr. Morris as to disability and inability to engage in any substantial, gainful employment, was admissible evidence for consideration by the referee and not, in itself, binding on him. But as it was not controverted by substantial evidence to the contrary, the referee's adverse decision on the ultimate fact was properly set aside.") (cited in *Gold* and *Whitson*).[2]

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[2] The Second Circuit has identified the *Gold* decision as a source of the treating physician rule within that circuit. *Schisler v. Secretary of Health, Education and Welfare*, 3 F.3d 563, 565 (2d Cir. 1993). The *Gold* decision in fact does announce a rule that "'[t]he expert opinions of plaintiff's treating physicians as to plaintiff's disability . . . are binding upon the referee if not controverted by substantial evidence to the contrary. *Teeter v. Flemming*, 7 Cir., 1959, 270 F.2d 871, 77 A.L.R.2d 636. *Kerner v. Flemming*, 2 Cir., 1960, 283 F.2d 916.'" *Gold*, 463 F.2d at 42 (quoting *Walker v. Gardner*, 266 F.Supp. 998, 1002 (S.D. Ind. 1967). But *Gold*, *Kerner*, and *Walker* all involved situations where the evidence that purported to contradict the views of the treating physicians was seen as too insubstantial to justify a denial of benefits. In short, the cited cases simply represent a straightforward application of the substantial evidence test

This history reveals that the precedent for the treating physician rule is hollow. It was created by judges who miscited earlier cases and provided no sound basis for preferring treating physician reports over examining physician reports.

In 1991, SSA adopted a regulation with a single statement of the treating physician rule. SSA did *not* adopt the rule because it found the rule to have any solid empirical basis. Instead, SSA adopted the rule to facilitate uniform national administration. *See* Standards for Consultative Examinations and Existing Medical Evidence, 56 Fed. Reg. 36932, 36934 (1991) ("judicial decisions in several circuits pointed to a need for a clear policy statement that would encourage uniformity of adjudication and provide the public and the courts with a definitive explanation of our policy on weighing treating source opinions. Accordingly, we proposed to replace existing regulations §§ 404.1527 and 416.927 with longer and more detailed provisions that would prescribe rules stating how we would consider and weigh medical opinions. . . . We were guided in the development of these final rules by the general principles articulated by the various circuit courts.").[3]

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rather than the application of a rule granting controlling weight to the opinions of treating physicians. And the Seventh Circuit's decision in *Teeter*, cited in numerous cases as a source of the treating physician rule, in fact rejects the rule.

[3] The regulations that made way for the treating physician rule regulation, former 20 C.F.R. §§ 404.1527 and 416.927 (1989), expressed no presumption in favor of treating physician reports. Former section 404.1527, applicable to the Federal Old-Age, Survivors and Disability Insurance program, stated "We are responsible for determining whether you are disabled. Therefore, a statement by your physician that you are 'disabled' or 'unable to work' does not mean that we will determine that you are disabled. We have to review the medical findings and other evidence that support a physician's statement that you are 'disabled.'" Former section 416.927, applicable to the Supplemental Security Income

Finally, there is absolutely no reason to conclude that the views of a treating physician selected by a claimant will be superior to the views of a physician selected jointly by labor and management fiduciaries of a collectively-bargained plan. The NFL Player Retirement Plan retains only physicians who are believed by both sides to be qualified, experienced, and objective.

II. THE DECISION BELOW VIOLATES ERISA BECAUSE IT STRIPS PLAN SETTLORS OF THEIR ABILITY TO SET STANDARDS FOR DISABILITY DETERMINATIONS.

SSA's treating physician rule pertains to the payment of disability benefits under the federal Social Security program. SSA's rule provides that "[g]enerally, we give more weight to opinions from your treating sources . . . If we find that a treating source's opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight." 20 C.F.R. § 404.1527(d)(2). Courts today rely on the regulation in reviewing SSA disability determinations. *E.g., McGoffin v. Barnhart*, 288 F.3d 1248, 1252 (10th Cir. 2002).

SSA has authority only over the federal Social Security disability program. 42 U.S.C. § 405(a). SSA has no authority over voluntary plans established by private employers, and its rules do not apply to such plans. Voluntary plans are subject to the comprehensive rules of ERISA. The decision below and the decision in *Regula* violate ERISA in several respects.

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for the Aged, Blind, and Disabled program, contained substantially similar language. SSA's grudging acceptance of the treating physician rule thus marked a change from its prior administrative rules.

A. ERISA does not require that an employer establish any disability, health, or retirement plans. *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 443-44 (1999). However, if an employer voluntarily offers employees a plan, the plan's fiduciaries must administer the plan in accordance with the terms of the plan, unless prohibited by ERISA. 29 U.S.C. § 1104(a)(1)(D). ERISA thus codifies a basic principle of trust law regarding trustee responsibility. *See* Restatement (Revised Second) of Trusts § 541 ("A fundamental duty of the trustee is to carry out the directions of the testator or settlor as expressed in the terms of the trust."); *Firestone*, 489 U.S. at 110 ("ERISA abounds with the language and terminology of trust law.").

The decision in *Regula*, which is the basis for the decision below, squarely and improperly rejected the fundamental trust law principle that the specific language of an ERISA plan must be followed when reviewing claims for benefits:

> [I]n the context of a disability claim such as Regula's, the key issue in determining whether a claimant is entitled to benefits is not the language of the plan, but the facts of the particular case. Hence, just as in Social Security cases, the issue in dispute in this case is not the meaning of the terms of the plan but whether the facts of Regula's case entitle[d] him to benefits.

Regula, 266 F.3d at 1141. *Regula* and the decision below violate ERISA's fundamental directive that trustees must follow plan language unless otherwise directed by ERISA. These decisions improperly impose on plan administrators and courts a particular method of weighing the evidence in the plan administrative record. This method may cause an award of benefits regardless of the terms of the plan.

B. Congress has authorized the DOL, not the SSA, to set standards for processing claims under ERISA plans. 29 U.S.C. § 1133. No DOL regulation or other authority has

ever imposed any form of a treating physician rule on voluntary disability plans subject to ERISA. The DOL recently issued elaborate procedures for handling disability claims under ERISA. 29 C.F.R. § 2560.503-1. The treating physician rule is incompatible with the DOL's claims regulation in several ways:

- Paragraph (b)(5) of the DOL regulation requires that plan claims procedures contain safeguards to ensure that decisions are consistent with plan documents and that plan provisions are consistently applied. The treating physician rule flies in the face of this provision. Indeed, plan provisions will not even be consulted and will be applied differently in cases that are factually indistinguishable because of differences in opinions between treating physicians.
- Paragraph (h)(ii) of the DOL regulation provides that the named fiduciary handling an appeal from an adverse benefit determination may not defer to the initial claims decision. But if the initial claims decisionmaker must defer to the treating physician, then it follows that the named fiduciary handling the appeal must defer to the initial determination.
- Paragraph (h)(iii) of the DOL regulation requires the named fiduciary on appeal to consult with an independent medical professional who is different from, and not subordinate to, the medical professional that was consulted at the initial claims stage. It would be senseless to compel the fiduciary to consult with an independent medical professional if that same fiduciary must effectively ignore that professional's advice and defer to the treating physician.

The decision below also is in direct conflict with Congress' directive to place the DOL in charge of the procedures for processing claims for ERISA benefits. Simply put, the decision below makes SSA an ERISA regulator. SSA may change, withdraw, or expand the treating physician rule, thereby changing the terms of ERISA disability plans without

consideration of the needs of ERISA plans. But Congress nowhere gave SSA such authority with respect to ERISA plans voluntarily established by private employers. *See Leahy v. Raytheon Co.*, 315 F.3d 11, 20 (1st Cir. 2002) (describing why "[t]he calculus of decision in social security cases differs significantly from that employed in ERISA cases").

C. The decision below is contrary to this Court's decision in *Firestone*. In that case this Court determined that plan settlors may grant their designated trustees discretion to interpret plans and decide benefits, and that the general standard of judicial review where such discretion has been granted is the arbitrary and capricous/abuse of discretion standard. 489 U.S. at 115. *Firestone* is also based on the trust principle that a plan settlor may establish binding plan terms.

The decision below squarely holds that, even where the plan settlor explicitly gives the trustees discretion to decide claims, that discretion must be turned over to the treating physician. Indeed, if properly documented, the treating physician's views may be "controlling." 20 C.F.R. § 404.1527(d)(2). The decision below cannot be reconciled with this Court's decision in *Firestone*.

III. THE DECISION BELOW STRIKES COLLECTIVELY-BARGAINED PLAN PROVISIONS AND INCREASES THE COSTS OF DISABILITY PLANS.

The decision below extends the treating physician rule to all ERISA plans, including collectively-bargained plans like the NFL Player Retirement Plan, that provide disability benefits. The Ninth Circuit's sweeping decision will have far-ranging effects on collectively-bargained disability benefits in particular, and on ERISA disability benefit plans in general.

The collective bargaining parties and settlors of the NFL Player Retirement Plan—the NFLPA and the NFLMC—have over decades very carefully and methodically developed detailed rules and generous provisions for the payment of disability benefits to eligible players. There are rules regarding when a player is unable to work. For example, payments by an NFL club or a charitable organization may be disregarded in determining whether a player is capable of gainful employment. There are rules as to when a disability arises from NFL football and thus entitles the player to a higher level of benefits. There are rules that provide higher benefits to a player who is unable to work shortly after his NFL career ends. There are rules that reduce benefits in some cases where a disability arises from abuse of alcohol or illegal drugs.

It is not, and never was, the intent of the NFLPA and the NFLMC to allow treating physicians to determine how these rules apply to players. The settlors of the NFL Player Retirement Plan intend that these decisions will be made by the Committee and the Retirement Board. The members of the Committee and the Retirement Board have extensive experience in reviewing claims. The NFLPA and the NFLMC have established a dispute resolution mechanism in which deadlocks with respect to a player's medical condition are resolved by a Medical Advisory Physician ("MAP") jointly appointed by management and labor. Under the terms of the Plan, a MAP's medical determination is final and binding on the Retirement Board. The treating physician rule renders the MAP mechanism ineffective, because it would set aside MAP determinations that are different from a treating physician's determinations.

Industry-specific disability rules developed over time in light of experience are not unique to the NFL Player Retirement Plan. Other plans covering employees in other industries have similar specialized rules. For example, the

collectively-bargained plan covering tens of thousands of bituminous coal miners provides disability benefits only to miners who become "totally disabled as a result of a mine accident," and the trustees of the plan have adopted detailed interpretative rules explaining how this standard is applied. *Brogan v. Holland*, 105 F.3d 158, 162 (4th Cir. 1997).

If the treating physician rule is superimposed upon these types of specially developed, industry-specific disability rules, the outcomes may bear little resemblance to the expectations of the collective bargaining parties. In *Brogan*, for example, two treating physicians opined that the claimant's disabling stroke occurred while he was on the job. Four examining physicians concluded that the stroke had occurred while he was at home. The court affirmed the trustees' decision to deny the claim based on their assessment of all the evidence in a manner consistent with their established interpretations of the plan standard. *Id.* at 162-63. If the court had applied the treating physician rule, the outcome may well have been different.

Twenty years ago, the Court restrained the tendency of the lower courts to rewrite the terms of collectively-bargained employee benefit plans to satisfy courts' idiosyncratic notions of the proper rules that should govern the award of benefits. *United Mine Workers of America Health and Retirement Funds v. Robinson*, 455 U.S. 562 (1982). As the Court then said, "when neither the collective-bargaining process nor its end product violates any command of Congress, a federal court has no authority to modify the substantive terms of a collective-bargaining contract." *Id.* at 576.

The Ninth Circuit's imposition of the treating physician rule onto all ERISA plans, whether established by collective bargaining or by unilateral employer decision, plainly undercuts the rule articulated in *Robinson*. As the Court has acknowledged, both collectively-bargained plans and non-bargained, employer-sponsored plans are free to set their

terms in any manner the parties choose, subject only to the constraints that Congress affirmatively has imposed by statute. *Id.* at 575 ("The terms of any collective-bargaining agreement must comply with federal laws that prohibit discrimination on grounds of race, color, religion, sex, or national origin; that protect veterans; that regulate certain industries; and that preserve our competitive economy.") (footnotes omitted); *Curtiss-Wright*, 514 U.S. at 78 ("[W]e are mindful that ERISA does not create any substantive entitlement to employer-provided health benefits or any other kind of welfare benefits. Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.")

The Ninth Circuit's decision to engraft the treating physician rule onto all employee welfare benefit plans that provide disability benefits produces a result fundamentally at odds both with the intentions of Congress when it adopted ERISA and with the rulings of the Court recognizing that these private welfare arrangements are best left to employees and employers who must decide what resources should be allocated to employee benefits and what rules should govern the award of such benefits.

All disability plans, not just collectively-bargained plans, will experience adverse effects from the treating physician rule. All disability plans may be required to pay disability benefits to unintended claimants, and plan settlors may elect to either reduce future disability benefits or decline to improve future benefits. The Ninth Circuit's decision will thus have the unintended consequence of reducing benefits for all qualified claimants.

CONCLUSION

The decision of the court of appeals below should be reversed.

Respectfully submitted,

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